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No. 518.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

MARK WENDELL PAINTER, a Minor, by Harold W. Painter,
His Father and Next Friend,
Petitioner,

v.

DWIGHT BANNISTER and MARGARET BANNISTER,
Husband and Wife,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Iowa.

RESPONDENTS' BRIEF IN OPPOSITION.

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TABLE OF CONTENTS.

	Page
Questions Presented	1
Statement	3
Failure to Timely Raise Constitutional Questions	18
Reasons for Denying the Writ	19
Response to Amicus Curiae Briefs	36
Conclusion	38

INDEX TO CITATIONS.

Cases:

Altmiller v. Forsman, 76 Idaho 521, 285 P. 2d 1064 .. 25
Armstrong v. Green, 260 Ala. 39, 68 So. 2d 834 25
Armstrong v. Manzo, 380 U. S. 545 .....20, 29

Bailey v. Mars, 183 Conn. 593, 87 A. 2d 388 25
Baram v. Schwartz, 151 Conn. 315, 197 A. 2d 334 25
Beach v. Leroy, 228 Ind. 122, 89 N. E. 2d 912 25
Bobroff v. Levin, 350 Ill. App. 501, 133 N. E. 2d 177 25
Brown v. Beachler, 224 Ind. 477, 68 N. E. 2d 915 25

Carrere v. Prunty, 133 N. W. 2d 692 .....23, 26, 28
Childers v. Childers, 136 N. W. 2d 268 23
Clifford v. Woodford, 83 Ariz. 257, 320 P. 2d 452 .. 28
Commonwealth v. Powers, 206 Pa. S. 415, 212 A. 2d 922 25
Commonwealth v. Reed, 202 Pa. S. 558, 198 A. 2d 344 25

Dixon v. Duffy, 342 U. S. 33 36
Drumb v. Keen, 47 Iowa 435 23
Durley v. Mayo, 351 U. S. 277 36
Durst v. Roach, 245 Iowa 342, 62 N. W. 2d 159 23

Ellison v. Platts, 236 Iowa 1211, 286 N. W. 413 23
Ex Parte Burrus, 136 U. S. 586 21

Farbes v. Warren, 184 Miss. 526, 186 So. 325 25
Fielding v. Highsmith, 152 Fla. 837, 13 So. 2d 208 .. 25
Finken v. Porter, 246 Iowa 1345, 72 N. W. 2d 445 23

Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N. E. 2d 613 25
Glass v. Bailey, 233 Ind. 266, 118 N. E. 2d 800 25
Griswold v. Connecticut, 381 U. S. 479 22

Halstead v. Halstead, 144 N. W. 2d 861 24
Hamilton v. Sourjohn, 332 Ill. App. 279, 75 N. E. 2d 42 25
Hanson v. Denckla, Del. & Fla., 357 U. S. 235 18
Henry v. James, 222 Ark. 89, 257 S. W. 2d 285 25
Herr v. Lazor, 238 Iowa 518, 28 N. W. 2d 11 23
Hitchcock v. Thomason, Mun. Ct. of Appeals for D. C., 148 A. 2d 458 25

In re Estate of Drumheller, 252 Iowa 1378, 110 N. W. 2d 833 38
In re J....., ... Mo. ..., 357 S. W. 2d 197 25
In re Mathers, 371 Mich. 516, 124 N. W. 2d 878 24

Jacobs v. City of Chariton, 245 Iowa 1378, 65 N. W. 2d 561 18
Jensen v. Sorenson, 211 Iowa 354, 233 N. W. 317 ... 23
Joiner v. Knieriem, 243 Iowa 470, 52 N. W. 2d 21 ... 23

King v. Shrum, 244 S. W. 2d 720 25
Kouris v. Lunn, 136 N. W. 2d 502 .....23, 24

Laub v. Caltobelotta, 33 Misc. 2d 397, 219 N. Y. S. 2d 363 28
Long v. McInnich, 264 P. 2d 767 25

May v. Anderson, 345 U. S. 528 20
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310 23
Meyer v. Nebraska, 262 U. S. 390 21
Morris v. Jackson, 66 Wyo. 369, 212 P. 2d 78 25
McKay v. Mitzel, 137 N. W. 2d 792 25
McKay v. Ruffcorn, 247 Iowa 195, 73 N. W. 2d 78 ... 23

Ohio v. Popovici, 280 U. S. 379 22
Osburn v. Roberts, 197 Okla. 206, 169 P. 2d 293 25

Paul v. Peniston, 235 La. 579, 105 S. 2d 228 25
Paulson v. Windelow, 236 Iowa 1011, 20 N. W. 2d 470 23
Pelton v. Halverson, 240 Iowa 184, 35 N. W. 2d 759.. 23
Pierce v. Society of Sisters, 268 U. S. 510 21
Prince v. Massachusetts, 321 U. S. 158 20

Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892 28
Root v. Allen, 151 Colo. 311, 377 P. 2d 117 25
Russell v. Russell, 208 Okla. 41, 253 P. 2d 136 25

Scott v. Ashcroft, 342 Ill. App. 33, 95 N. E. 2d 122 ... 25
Selmen v. Phillips, 384 U. S. 210 20
Shamenek v. Allen, 179 Pa. S. 169, 116 A. 2d 336 ... 25
Skinner v. Oklahoma, 316 U. S. 535 20
Smith v. Smith, 188 Tenn. 430, 220 S. W. 2d 627 25
Stout v. Massie, 140 W. Va. 731, 88 S. E. 2d 51 25
Stubbs v. Hammond, 135 N. W. 2d 540 29

Taylor v. Taylor, 182 Okla. 11, 75 P. 2d 1132 25
Testerman v. Frederich, 323 S. W. 2d 522 25
Thein v. Squires, 250 Iowa 1194, 97 N. W. 2d 156 24
Thumma v. Hartsook, 239 Md. 38, 210 A. 2d 151 25
Trenton v. Christ, 216 Md. 418, 140 A. 2d 660 25
Trotter v. Pollan, 311 S. W. 2d 723 25

Wall v. Hardee, 240 N. C. 465, 82 S. E. 2d 370 25
Wehrman v. Farmers & Merch. Sav. Bk., 221 Iowa 249, 259 N. W. 564 18
Werling v. Heggen, 208 Iowa 908, 225 N. W. 952 23

Young v. Ragen, 337 U. S. 235 36

Constitution and Statutes:

United States Constitution—
First Amendment 2
Fourteenth Amendment 2
Hawaii Sess. Laws, Act 83, § 1 (2) 26
Iowa Rule of Civil Procedure, 344 (f) (15) 23

Miscellaneous:

ABA Section of Family Law, 1963 Proceedings, P. 38 26
Adoption of a Minor, 343 Mass. 292, 178 N. E. 2d 264 25
15 A. L. R. 2d 432, 435 27
39 A. L. R. 2d 258, 264 29
66 A. L. R. 2d 1410, 1413-1416 34
25 Am. Jur., Habeas Corpus, § 80, p. 205 27
27 Am. Jur., Infants, § 108 27
15 C. J. S., Conflict of Laws, § 14 (d), p. 911 38
67 C. J. S., Parent and Child, § 4, p. 630 38
67 C. J. S., Parent and Child, § 11 27
Comments of Harry M. Fain, 1963 Chairman of Committee on Child Custody of the Section of Family Law appearing in ABA Section of Family Law, 1963 Proceedings 27
Des Moines Register, February 20, 1966 16
Foster and Freed, "Child Custody", 39 N. Y. Univ. L. Rev. 423 27
Goodrich, Conflict of Laws, Section 136, p. 272 38
79 Harvard L. Rev. 1710, 1715 37
Madden, Persons and Domestic Relations, Hornbook Series (1931) 26
Minutes of Board of Directors of the American Civil Liberties Union of February 28, 1966 37
Peck, Domestic Relations (1930), pp. 371-372 27
Section of Family Law of the American Bar Association 26
Webster's Third New International Dictionary 30

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents pray that Petitioner's petition for writ of certiorari be denied.

QUESTIONS PRESENTED.

Respondents are dissatisfied with Petitioner's "Questions Presented", and submit the following in substitution.

1. **Due Process Clause of the Fourteenth Amendment.**

Was this provision violated by the Supreme Court of Iowa by its decision awarding legal custody of a child to his grandparents who have had actual custody for such a period of time and under such circumstances that it would be detrimental to the child's emotional health to return him to his biological father, even though the father did not legally abandon the child and even though the father is not morally unfit?

2. **Due Process Clause of the Fourteenth Amendment and the First Amendment.**

Were these provisions violated by the Supreme Court of Iowa settling the custody of a minor child with his grandparents and basing its decision upon the child's best interests, when the Supreme Court of Iowa incidentally took note of wide differences in the religious views, philosophies of life and modes of living between the biological father and the grandparents in considering the adjustments the child would necessarily be required to make if moved?

3. **Due Process Clause of the Fourteenth Amendment.**

Was this provision violated by the Supreme Court of Iowa in awarding legal custody of a minor child to his grandparents upon the undisputed testimony of a competent child psychologist, three public school teachers and a minister, and upon other evidence; that it would be highly detrimental to the child's emotional health to require him to be moved from his present surroundings, particularly in the absence of any offer of evidence to the contrary?

STATEMENT.

Mr. and Mrs. Bannister, age 60 at the time of trial (R. 555, 476), live on an 80-acre farm between Ames and Gilbert, Iowa, but do not farm the land themselves. Their home is well-kept, comfortable and spacious (Court's Ex. 2, p. 4, par. 4, R. 572; and Exs. 48, 49, 50, R. 481-482), and their assets insure them a comfortable living (R. 493-494, 555). Both are college graduates, as were their four daughters (R. 476, 555). Mr. Bannister has owned and published various newspapers, and was in recent years an associate professor at Iowa State University at Ames (R. 555, 557). Both are regarded excellently in the community of Gilbert,[1] where Mr. Bannister has been a school board member and Sunday School teacher at the Congregational Church (R. 534, 385, 529, 385). When she finished college, their daughter Jeanne went to Anchorage, Alaska, as society editor for the Anchorage Times. There she met Harold Painter and married him April 6, 1957 (R. 478).

Mr. Painter, age 34 at the time of trial, was born and raised in the San Francisco area. At age 2½ he was placed by his parents in the foster home of Mr. and Mrs. Leo McNelly (R. 23), because neither his mother nor his father were allowed to have him (R. 177). The parents were later divorced (R. 235). Harold flunked out of one

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[1] Dr. Glenn R. Hawkes, a psychologist whose testimony will be given in more detail later, said the Bannisters are a very stable couple and have a very good marriage relationship based on respect and affection (R. 435). A Story County, Iowa, Social Welfare Department report prepared at the request of the trial court stated: "Dwight and Margaret Bannister are delightful as individuals and as a couple. This is no doubt due to their fine mental health. . . . They are very considerate. They relate on a sincere and meaningful level. They might be described as 'real' people. . . . Both have a great deal of energy and zest for living. . . . Mr. and Mrs. Bannister are intelligent and well educated. They are people who have continued to think and to grow intellectually" (Court's Ex. 2, p. 2, pars. 2-10, R. 572).

school ("I just felt the academic subjects were an imposition and unnecessary for what I had in mind.") and later out of a second after he had completed one year of high school (R. 25, 134). At "loose ends" (R. 235) at age 17, he joined the Navy and went to Hawaii (R. 28, 29). Later he attended a two-year college but testified: "I did not accept my diploma . . . (because) there was no reason for it" (R. 31-32). He enrolled in another college but quit because he did not want to take the required courses, testifying: "I was quite disappointed at the level at which they were taught and actually quite bored with them" (R. 31-34).

In the ten years between the time he left college and the time of trial, Mr. Painter worked for six newspapers in six different cities (R. 34, 35, 42, 43, 46, 62, 81-83). He left one job because of dissatisfaction with pay (R. 35), one for less pay because he wanted a job "that would be just enough to get by and require as little work as possible (R. 42), one because he was asked to leave (R. 43), and one because he "disliked it very much" (R. 44-46). During the same period he worked for the publications department of Washington State University but was asked to leave (R. 46),[2] did free lance writing at home during a period of unemployment (R. 50), and worked as a graphic designer (R. 60). At the time of trial he worked at the Oakland Tribune, but was dissatisfied with his job and contemplated moving to Berkeley, California (R. 128, 142-149).

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[2] Prof. Henry Grosshand, Mr. Painter's supervisor at Washington State University, testified: "He had a belief that in almost any area he was qualified to make his own decisions. . . . I think at times what I would call self-confidence bordered on arrogance. It was very difficult to present to him alternatives to his own way of approaching things. He did not take kindly to advice of almost any kind. . . . He believed his opinions about any aspect of publishing were indisputable even if he possessed little or no training or experience in the particular subject" (R. 344, 345, 348).

Mark was born in 1958—his sister Janet in 1959 (R. 3, 42). After being released from Washington State University in October of 1962, Mr. Painter had about eight job offers but turned them all down (R. 51). To support the family his wife, Jeanne, took a full-time job with a newspaper at Moscow, Idaho. She took the children daily to nursery school at Moscow while Mr. Painter stayed home and wrote, cooked meals, washed dishes and did the housework. On December 6, 1962, Mark was left home because of illness. Jeanne and Janet, then age three, were on their way to Moscow when their automobile skidded and collided with a school bus. Jeanne was killed instantly, and Janet died four days later (R. 47-48). Mr. Painter testified there were two funerals for Jeanne: The first was in his basement with no one but himself present. The second was at a church at Pullman which he said was for the gratification of her friends, "and that was the only purpose as far as I was concerned." At the church funeral he wore a sports shirt and sweater with no necktie (R. 54, 142). Jeanne and Janet were buried in the Bannister family plot at Ottumwa, Iowa; Mr. Painter did not accompany their bodies to Iowa for the burials (R. 54, 55).

Continuing unemployed after his wife's death, Mr. Painter consumed her estate of $4300-$4400, which included stocks given to Jeanne by the Bannisters with the hope they would be used for the children's education,[3] and also included $250.00 and $343.26 belonging to Janet and Mark, respectively, of which Mr. Painter was trustee (R. 57-58, 130, 479). He used the money to buy $800-$1100 worth of camera equipment, a car, a 24-foot sail

[3] Mr. Painter's foster mother, Mrs. McNelly, wrote the Bannisters in August of 1963: "I know how Jean felt about Hal spending her money because she told me and I'm sure she would have wanted Hal to save most of it for Mark's education and I told him so. But he turned deaf ears . . ." (Defs. Dep. Ex. 1, p. 3; R. 375).

boat costing $3500, and for living expenses (R. 58-60). He bought the boat intending to sell it at a profit, but sold it at a loss (R. 129). He gave some of his camera equipment away, sold some for $180, and returned some to the seller to terminate the contract (R. 136). He was in an accident and wrecked the car he purchased, bought another car which went to pieces in two days, and then bought a third. Not having had any employment for over seven months (except a job from which he earned a total of $150), and having used all the money from Jeanne's estate and the children's trust accounts, he was in financial straits so took a job with the Contra Costa Times in June or July of 1963 (R. 75-76).[4]

Most of the evidence regarding Mr. Painter's religious beliefs and practices was offered by him. No objections were interposed to any questions asked by Respondents dealing with those matters. And, as will be pointed out later, no suggestion was made in the trial court or in the Supreme Court of Iowa that such considerations were improper for constitutional or other reasons, until the petition for rehearing was filed after the opinion of the Supreme Court of Iowa was handed down. The evidence introduced was this: Mr. Painter is agnostic (R. 134), belongs to no church or religious group (R. 53), does not accept the Christ Diety (R. 133), says he has had no evidence presented to him that there is an infinite God (R. 149), and generally left it to Jeanne to take Mark to the Congregational Sunday School, which she did regularly (R. 53). After Mr. Painter and Mark left Pullman

[4] The record is replete with examples too lengthy to detail of Mr. Painter's inability to handle money. Mrs. Betts, his natural mother, and Marylyn, his present wife, testified he is impractical about money (R. 173, 237, 238, 245). Both his first and second wives handled the family funds and check writing (R. 136, 162, 173, 274, 331). Jeanne had commented in letters to her parents about his visionary ideas, lack of financial responsibility, and lack of responsibility toward small children (R. 500-502).

shortly after Jeanne's death, Mark was never taken to Sunday School while his father had his custody (R. 133). Mr. Painter testified he has read a lot of Zen Buddhism and has been very much influenced by it (R. 133-134). The present Mrs. Painter is Catholic. If they had Mark's custody, they would send him to a Congregational Church and Sunday School but, testified Mr. Painter: "In all honesty, I would not insist on Mark going to church every Sunday" (R. 116, 151).

Throughout Mr. Painter's testimony there were references to his temper. For instance, he said he "blew his stack" at his wife (R. 144) and, referring to the Bannisters, said: "I wish I would have strangled them both—I wish I had" (R. 145).

After the accident Mrs. Betts and Mrs. McNelly stayed with Mr. Painter and Mark as long as they remained in Pullman (R. 264). In February of 1963 Mark stayed in McNellys' trailer for three weeks (R. 141), then Mr. Painter rented a house in Glen Ellyn for three and a half months for he and Mark during which time Mark would sometimes stay with McNellys (R. 59-60, 141). He then moved to Walnut Creek into a very nice apartment with a swimming pool which had a sign on it saying children would be allowed to visit Sundays (R. 481), and he sent Mark to live with McNellys, who were just leaving on a one or two month fishing trip (R. 63, 141-142). Mr. Painter did not pay the McNellys anything for Mark's keep (R. 66, 368), but they thought he should "so he would understand there was a responsibility that a father had to the child" (R. 206-207). They mentioned it to him (Defs. Dep. Ex. 1, pp. 1-2, R. 375), and Mr. Painter responded by calling the Bannisters and asking them to take Mark to Iowa to get him started in school (R. 67, 480). He did not tell the McNellys that Mark was going to Iowa until the Bannisters arrived to get him, notwithstanding that

Mark was then living with McNellys. Naturally McNellys were surprised[5] (R. 194, 207). Mr. Painter testified he thought Mark would be better off with the Bannisters because they were educated, sensitive people (R. 66), and felt Mark should be in a permanent home where he could start school and not have it interrupted—that he should be settled with people who were settled (R. 63, 64).

When Mark came to Iowa in July of 1963, at age five, he would have flights of fancy and seemed incapable of distinguishing fact from fiction (R. 512, 513). Mr. Painter had been concerned about his exaggerations (R. 140). Mark also had serious behavioral problems. He was very belligerent to children who were smaller than he (R. 485) and always wanted to prove he was right. His eating habits were not good. He was aggressive toward animals; he would throw rocks at dogs which were trapped in the basement entryway and would not let them escape (R. 486). At school he would grab other children by the neck (R. 524) and once choked a little boy as hard as he could. His music teacher told of his pushing a child down the stairs, slapping another on the ear, and pulling the chair out from under another (R. 544). On the school bus he pushed a girl out of her seat into the aisle, and twice the bus driver had to stop the bus, go back and forcibly set him down in his seat (R. 385-386). The other children did not want to play with him because he did not know how to play (R. 540), and would avoid him on the bus because otherwise he would attack them (R. 398).[6] Mr.

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[5] Mrs. McNelly wrote the Bannisters: "I can't believe a little money could make such a difference in a person, or maybe it brings out the real person," and added that she hoped he would change soon and be a good father to Mark (Defs'. Dep. Ex. 1, pp. 1, 5, R. 375).

[6] When he misbehaved toward other children, his music teacher testified, he was not just playing, but was upset (R. 548). The bus driver said he was very aggressive and completely undisciplined (R. 385). The kindergarten teacher, who

Painter testified about deportment trouble Mark was having at Pullman (R. 52), and that when fighting he had to be stopped from hurting other children (R. 68). Yet when Mrs. Bannister tried to discuss these problems with Mr. Painter on the telephone, she was rebuffed (R. 514).

Mark began kindergarten after coming to Iowa. The trial of this case occurred after his completion of first grade. He is now in third grade at the Gilbert school. His behavior began improving about Christmas time of his kindergarten year (R. 486), and by the time of trial he had made a great deal of improvement (R. 544, 525, 537, 540, 386, 487). Mark's I. Q. is 120-130, which is considerably above average (R. 417). He attends Sunday School and church practically every Sunday at the Gilbert Congregational Church (R. 384, 547). The high quality of care Mark receives in the Bannister home is undisputed[7] (R. 483-484, 549, 519, 526, 487, 493).

Mr. Painter wrote Mark "once a month or whenever the spirit moved me" (R. 72). Between Christmas of 1963 and June of 1964, Mr. Painter promised on four occasions to visit Mark, but failed each time (R. 72, 77, 489, Ex. 26, p. 3). Bannisters had a letter from Painter July 14, 1964, and next heard from him Labor Day, saying he would visit them and Mark September 9. On September 9 he called saying he would be there September 16, 1964 (R. 489), at which time he did make his first visit to Iowa. Regarding that visit, he testified he "was not sure about my interest as to taking Mark back in September. . . . The same unstable situation existed that existed at the time I sent him

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had 20 years teaching experience, said he was emotionally disturbed and acted like he did not know how to behave (R. 523-524). Another, who had taught over eight years, said he had the worst emotional problems she had ever seen (R. 540).

[7] At the trial Mr. Painter testified: "I think Mark has had a good home with the Bannisters . . . I also recognized the Bannisters were very good people" (R. 140).

to Ames so I was apprehensive about this disrupting of him" (R. 83-84). He did not try to take Mark with him at that time (R. 507). He married Marylyn Hanson November 28, 1964 (R. 23), but did not seek Mark's return until June of 1965.

The marriage to Miss Hanson terminated a long period of uncertainty about Painter's remarriage plans. He had considered marrying a Helen Boutell in November of 1963 (R. 144). But on April 13, 1964, he wrote the Bannisters: "The marriage, I'm afraid, is off. After a certain period of fruitful negotiations, I was told that she, at age 37, is not ready to settle down—plus a certain incompatability began to express itself. So the outcome seems perfectly reasonable and 'acceptable.' As a $2-a-crack fortune teller once told me, I'm apt to put my romantic interest on an ideal pedestal of my own making and then be completely frustrated (when) my ideal is violated." In June of 1964 he called the Bannisters saying he was going to marry Marylyn Hanson in July (R. 488-489). That date was changed several times; Painter testified: "I became very pushy. I wanted to get married right away and settle things right away and Marylyn got nervous about it." Their marriage plans remained uncertain until November (R. 143).

When Bannisters took Mark in July of 1963, Mr. Bannister suggested to Mr. Painter that he send $50 a month for Mark's support. Painter turned away and said nothing (R. 564). Bannisters later repeated the suggestion in a letter (R. 74). During the more than two years which Mark was in Iowa before the trial, Mr. Painter sent a total of $135, plus money for a Christmas present (R. 488).[8]

[8] Mrs. McNelly wrote that Painter did not want to spend one cent on Mark, that he was "using" the Bannisters so he could spend his money on himself, and that "There are laws to protect youngsters and they should be used in such cases" (Defs'. Dep. Ex. 1, R. 375).

In June of 1965 the Painters and Bannisters had a discussion in the Bannister home, ending with Mr. Bannister saying he would not permit the Painters to take Mark (R. 90-102). The next day the Painters, although having their California-licensed car with them, rented an Iowa car with Iowa plates so as not to be recognized and went to Mark's school. Mr. Painter testified: "We cruised, and just observed the school, looked for sentries, which we think we found one." They saw Mark on the playground and told the teacher they were going to take him to California. When the teacher put her hands on Mark they removed them, grabbed the boy and ran for the car with Mrs. Painter blocking the teacher who was frantically chasing them. The superintendent intervened in time, and Mark stayed at school. He was shocked, stunned, frightened and crying, and spent the rest of the day just staring into space (R. 103-104, 131, 133, 392, 534, 542). This habeas corpus action followed.

Several witnesses related comments which Mark had made to them about Mr. Painter and the Bannisters. He told Mrs. Felber, a neighbor: "We are a family now" (R. 554). He told Mrs. Mumm, a teacher, that his father was always going to do things for him or come to visit him, and would forget (R. 546). He told Mrs. Sherwood, a teacher: "My father wants me to live with him, but I don't want to go" (R. 538). He told the Story County Welfare Worker that he definitely wants to stay with the Bannisters (Court's Ex. 2, p. 2, R. 572), and told Dr. Hawkes, the child psychologist, the same thing (R. 424, 425).

Mark's three teachers and his minister all testified that moving Mark from the Bannister home would have a serious psychological effect on him (R. 528, 536, 539, 546-547). The Story County, Iowa, Social Welfare Department also recommended that he remain in the Bannister home.

Glenn R. Hawkes is a child psychologist and, at the time of trial, had been head of the Department of Child Development at Iowa State University for 12 years.[9]

He spent 25 hours evaluating Mark and the Bannisters (R. 408-411). Following is a synopsis of his testimony:

> Mark is now in his latency period of development, which is the very critical stage where he is developing most of his concepts, his attitudes about himself and maleness, and his attitudes about the world (R. 415, 419-430).
>
> When he came to Iowa from California, Mark was aggressive, frightened, had difficulty sleeping, and had not internalized many controls. He was anxious and unsettled (R. 428). He remembers, before coming to live with the Bannisters, of wondering what was going to happen to him, who was in charge of him, and who he could turn to (R. 420-421). He remembers wondering where his father was, and

[9] Dr. Hawkes has a bachelor's and master's degree in psychology, and doctor's degree in child psychology from Cornell University. He has lectured and conducted workshops at a number of American Universities, has written some 40 research articles in professional journals, is co-author of the book, "Behavior in Child Development From Five to Twelve," and of another book on the educationally disadvantaged child. He belongs to a number of professional associations, and is a past president of the National Association for Education of Young Children.

Dr. Hawkes was on the staff of the 1960 White House Conference on Children and Youth, was a consultant with the Ford Foundation in India, has been a consultant for several U. S. Government agencies and the United Nations. He is an educational consultant with the national project "Head Start". For four and a half years he served as a psychologist in the Armed Forces.

He is consulting or has consulted with the Iowa Children's Home Society, which is a foster home program, the Elizabeth McCormick Memorial Fund in Chicago, which does child research, the Toledo Welfare Agency, Toledo, Ohio, the welfare agency at Fort Worth, Texas, and other agencies.

For a number of years he has been a practicing child psychologist on a private basis (R. 404, 408).

being frightened because he was not there (R. 423). He remembers being yelled at and someone being angry with him, and thinks it was his father (R. 424-425).

A father figure is important in a child's development because he typifies maleness for the child (R. 427). Before coming to the Bannisters, Mark was confused about the father figure. He was not used to having one because Mr. Painter and Mr. McNelly shared what semblance of a father figure there was (R. 427-428). The father image was very tarnished, if it existed at all (R. 463). He is very confused about what to call Mr. Painter, and vacillates between calling him "my father", "Hal" and "that man" (R. 425). He felt he could not depend on Mr. Painter (R. 425, 474-475). He remembers very little about his biological mother and sister (R. 423).

Since coming to Iowa, Mark is making great progress toward emotional adjustment (R. 415). He does have some anxieties which must be suppressed materially (R. 415), however these can be faced in a healthy situation (R. 415). He has quite a lot of aggression but it is under control (R. 420).

Mark has spent much time since coming with the Bannisters in determining who he is and where he fits into his environment. This is normal for a child between ages five and seven (R. 430). He sees his present family as a cooperative unit, and sees a place for each person in it, including himself (R. 420). He sees his grandfather as his father figure and his grandmother as his mother figure (R. 414). He has a positive attitude toward families, and it is clear that he structures his family around the Bannisters (R. 414). He has a very warm feeling for Mr. Bannister; they have the kind of relationship that all fathers would hope they could have with their sons (R. 426). His relationship with Mrs. Bannister is

fine and respectful, and there is a warm bond of affection (R. 428).

The best way to develop a sense of responsibility in a child is for the parents to be responsible people so as to set a model by which a child builds his life (R. 416). Mark is very much concerned about good behavior, and is in the process of deciding, through adult models, what is tolerable behavior and what is not (R. 420).

Mark is very pleased with the progress he has made in school (R. 421, ll. 21-22). He is made to feel, by the adults around him, that he is an adequate person (R. 422). He has adequate contact with children his own age (R. 456).

I think Mark should be placed with the Bannisters on a permanent basis. The unsettled conditions throughout his life up to the point will cumulatively become more and more detrimental if they are allowed to persist (R. 429). It is very critical that he have a permanent arrangement. If he were four or five years younger, it would be less important, because there would be time to make up whatever deficiencies might occur because of moving from one place to another. But at this point in Mark's life it is critical that he be established in one place (R. 430).

While he has been with the Bannisters, he has been through a process of developing a concept of his role in life; it is now well established. By remaining with the Bannisters he can build on the foundation he has. He does not have to go back, pick up the pieces, and start over again (R. 431). Mark is already in a home where he has a mother and father figure. To move him from this is a rather unthinkable solution to the problem (R. 443). This is true even if you assume the best about Mr. and Mrs. Painter (R. 441).

Leaving Mark with the Bannisters is the only tenable solution (R. 443).

If the natural parents are suitable persons, a child psychologist would normally recommend that the child be with them only if the child had continuously lived with them in the past (R. 443). The biological father is necessary only for conception. The psychological father is most important. One has to earn being a father (R. 426). The persons who become the important figures in a child's life are the mother and father figures, whether there is a biological tie or not. If not, I think our whole system of adoption would be a farce (R. 443).

If Mark were disrupted at this point, if he is withdrawn from the parental figures established in his own mind and withdrawn from his present environment, he will become unsettled and anxious all over again. There would be a process of rebuilding which would be much more painful, and the chance of success would be much less likely in the second case (R. 430-432).

If Mark were moved, there is, in my opinion, a 90% chance (R. 445) that he would either develop a great deal of aggression or would withdraw (R. 432). Because of the built-up anxiety and potential aggression in Mark at the present time, he would probably become aggressive (R. 434), which would be acted out in terms of destructive tendencies. A great deal of juvenile delinquents are aggressive people because of inadequacy in their own background (R. 433). If he withdrew, he would become an inadequate person to the point that he would not be a productive member of society (R. 432, 433). It is widely recognized in psychological works that adoptions of children from six to eight years old, if there is a prior history of instability, are usually unsatisfactory (R. 447).

> I am appalled at the tremendous task Mr. Painter would have if Mark were to return to him, because he would have to build a relationship from scratch. There is essentially nothing on which to build at the present time. Mark is aware Mr. Painter is his father, but he is not very clear about what this means. In his own mind, the father figure is Mr. Bannister. I think the prognosis would not be good (R. 460-461).[10]

Petitioner's statement is extremely slanted—to the point of inaccuracy in places. For example, on page 10 the Petition discusses Painter and his wife going to the school and attempting to take Mark in June of 1965, stating: ". . . the Painters desisted rather than use anything resembling force to assert Painter's unquestionable right to return his son to his home." Mr. Painter's own testimony regarding the incident was:

> "I identified myself (to Mark's teacher) as Mark's father, and introduced her to Marylyn. I asked the teacher a few questions about how Mark was getting

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[10] We question the propriety of Petitioner, in footnote 3 on page 17 and footnote 21 on page 35, setting out views of doctors which were not offered in evidence and were not before the Supreme Court of Iowa when it decided this case. The footnotes are intended to bolster Petitioner's assertion on page 25 that Dr. Hawkes' views "do not represent the opinion of the psychological profession generally or of other experts in the matters of child care." In rebuttal we set out from the Des Moines Register of February 20, 1966, the following quotation from Richard J. Jenkins, M. D., Professor of Child Psychiatry and Chief of Child Psychiatry Service at the State University of Iowa, Iowa City:

> "The decision before the court was whether Mark was to be removed from the home of his grandparents who are presently meeting his needs. . . . It seems clear from the evidence cited that Mark has had a difficult past, and that he showed the effects of it when the Bannisters took him. It is reported that he has made good progress. In a crucial game one does not pull a winning pitcher. The issue in this case is the welfare of the child as against the 'rights' of a father. Children are not possessions. They should never be so regarded."

> along in school. Then I handed her this card and said, 'I am acting in the law, Mrs. Sherman, I believe. We are taking Mark with us to return to California. Do you have any questions, please call my attorney.' We picked Mark up and started toward the car. The woman put her hands on Mark. I don't believe she said anything, but I said, 'Madam, please take your hands off my son. You are violating the law.' She wouldn't. Marylyn (Painter's wife) stepped in and removed her hands from Mark's arm and actually blocked the woman. I put Mark in my arms, said, 'Here we go, Bucko, the game is on,' and ran with him to the car."

At pages 12-15 of his Petition, Petitioner suggests that Respondents have displayed an improper attitude toward him. The Petitioner fails to point out the undisputed evidence that Bannisters have never been critical of Mr. Painter in Mark's presence (R. 565), and regularly wrote him and other California relatives about Mark's progress in school (R. 247). Mr. Painter promised on no less than five occasions that he would come to Iowa to visit the boy. Each time the grandparents prepared for and told Mark his father would be coming, but each time Plaintiff found reasons not to come. It was not until Mark had been in Iowa for a year and three months that Painter first visited his son (R. 489). After so many disappointments for the child, it is little wonder that Bannisters stopped talking to him about his father and about the expected visits. Painter indicated his lack of interest in Mark in ways other than failing to visit and failing to furnish support. For instance, Mrs. Bannister sent Painter some of Mark's kindergarten drawings to which he responded: "I got that pile of junk of Mark's that you sent me" (R. 514).

On P. 10 of his Petition, Petitioner notes parenthetically that he has, since the trial, taken a job at the Job Corps

camp in Pleasanton, Calif. Since he has chosen to depart from the record to give the Court this information, we believe the information with respect to his post-trial employment and housing should be accurate. He did take employment with the Job Corps at Pleasanton, but the fact is he has now left even that employment and has moved from his Walnut Creek home to Brookdale, California. The record and Petition for Writ are thus barren of any information regarding whether Petitioner is now employed, his income, if any, the housing and care which he could furnish Mark if he had his custody, the probable duration of his residence at Brookdale, the hours he works—if he is employed, whether Mrs. Painter is working, or any information whatever about the life Mark would be exposed to if sent to live with Petitioner. The only thing which remains the same as at the time of trial is that Petitioner does not stay with a job or in a community very long at a time. Mark needs stability and permanency rather than constant uprooting.

FAILURE TO TIMELY RAISE CONSTITUTIONAL QUESTIONS.

The constitutional questions presented in the Petition were not timely raised in the Iowa courts. They were first presented in the Petition for Rehearing, which is too late since there was prior opportunity to raise them. Hanson v. Denckla, Del. & Fla., 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283. The Supreme Court of Iowa declined to consider these constitutional questions when first raised in the Petition for Rehearing, upon well-established Iowa authority that constitutional questions must be urged in the trial court and upon the original submission of the appeal to the Supreme Court. Jacobs v. City of Chariton, 245 Iowa 1378, 65 N. W. 2d 561; Wehrman v. Farmers & Merch. Sav. Bk., 221 Iowa 249, 264, 259

N. W. 564. Petitioner could have timely raised these questions in the following ways:

(1) By not himself introducing evidence concerning his religious beliefs and practices (e. g., R. 26, 27, 53), and by objecting to that which was introduced by Respondents, which he did not do (e. g., R. 133). Had he felt that such matters were irrelevant, he was required to make his record at the time the evidence was received.

(2) By raising such questions upon the original submission of this case in the Supreme Court of Iowa. Such matters were presented in Respondent's (Appellant's) brief upon the original submission and were responded to by Appellee without any claim that the Federal Constitution precluded their consideration. (E. g., Petitioner's (Appellant's) original brief in Supreme Court of Iowa, p. 27 et seq.) Also, Respondent's (Appellants) argued in their original brief in the Supreme Court of Iowa that Mark's custody should remain with them even if there was no parental relinquishment or unfitness (P. 68 of Appellants' Brief, first paragraph). Appellee disagreed with this assertion in his original brief (P. 114 et seq.), but nowhere suggested that a constitutional question was involved.

REASONS FOR DENYING THE WRIT.

1. (a) **Petitioner does not have a "family relationship" with Mark because he has not had his custody since July of 1963. United States Supreme Court cases cited by Petitioner do not consider substantive child custody questions, and have no reference to a situation where Petitioner does not have actual custody and control of the child. No federal question is presented.**

In this section, in the preliminary paragraph on P. 18, and throughout his entire petition Petitioner speaks of

the decision in this case as having destroyed an existing family relationship between him and Mark, ignoring the fact that Mark has lived with Respondents since July of 1963. In cases of this kind the question is not whether the child shall be removed from the home of the parent, but rather whether the child shall be removed from the home of the non-parents who have had his actual custody for a substantial period of time. Mark's family relationship is with the Respondents. The question is, was the Iowa court required to destroy that relationship—the only meaningful one the boy has—to satisfy what Petitioner claims are his "rights" as the natural parent.

The United States Supreme Court cases principally relied upon by Petitioner on pp. 18 and 19 of his petition have no factional similarity to the case at bar. None involve the substantive questions of change of custody. In those in which the court spoke of rights of parents, the parents had actual custody and an actual family relationship existed.

The case of Prince v. Massachusetts, 321 U. S. 158, involved the constitutionality of a child labor statute whereunder children were sought to be prohibited from distributing Jehovah Witness literature on the streets. The question revolved about the constitutional rights of the parents who were the established custodians. This was not a custody case.

Nor is Skinner v. Oklahoma, 316 U. S. 535, a custody case. There the question was whether the statute providing for vasectomy for certain criminals was constitutionally valid.

May v. Anderson, 345 U. S. 528, dealt with whether Wisconsin had constitutional jurisdiction to adjudicate a custody question, and the case noted that the issue was separated from that of the future interest of the children.

Selmen v. Phillips, 384 U. S. 210, was a memorandum decision approving Armstrong v. Manzo, 380 U. S. 545.

The latter case holds only that due process requires that a father be given reasonable notice of a hearing to adopt his child and does not involve custody.

Pierce v. Society of Sisters, 268 U. S. 510, held a statute requiring children to attend public (not private) schools unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children **under their control**. Custody was not involved.

Meyer v. Nebraska, 262 U. S. 390, held a Nebraska statute unconstitutional which prohibited the teaching of any language except English below the eighth grade. Custody was not there the issue. The opinion noted the statute did not seek to effect a valid state purpose.

To be meaningful, whatever language is cited from these cases by petitioner must be read in context. These are not child custody cases and the statements quoted are not relevant to a situation where the parent does not have custody of the child. Custody of Mark Painter must be determined by his best interests, not by abstract statements of the Court relating to family privileges, security and integrity which, as between the boy and petitioner, are non-existent.

The constitutional questions now argued were not timely presented to the Iowa courts. But in any event, no federal question is presented here to justify the granting of the writ requested. This was made clear as long ago as 1889 in Ex parte Burrus, 136 U. S. 586. There a father sought custody of his child from the grandparents. The child was taken to the grandparents' home during the mother's terminal illness. The father remarried and wanted the child returned. A writ of habeas corpus was issued by a United States District Court requiring surrender of custody to the father, and the grandfather was imprisoned for contempt when he disobeyed the writ. The

United States Supreme Court ordered the release of the grandfather, and in so doing made this pronouncement:

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States **or its Constitution.**" (Emphasis added.)

The same principle is announced in Ohio v. Popovici, 280 U. S. 379.

(b) **The decision in this case was in furtherance of a valid state purpose, to-wit, protecting children within Iowa, and was consistent with a large body of Iowa child custody law.**

Petitioner also relies upon Griswold v. Connecticut, 381 U. S. 479, but in a concurring opinion in that case it was pointed out that the Connecticut law was not necessary to accomplish any permissible state policy.

Personal rights guaranteed by the Constitution are never viewed in a vacuum. They are always weighed against the public necessities involved. Even Petitioner recognizes the right of the state to remove a delinquent child from a home and institutionalize him, even though the parents are fit and are not guilty of abandonment, and the right of the state to prevent truancy or give medical treatment which the parents, perhaps for religious reasons, refuse to provide (Petition for Rehearing, filed in Supreme Court of Iowa, p. 34, footnote 1). The obvious

state purpose in the case at bar and similar cases is to protect children living within its boundaries. That such a state policy is permissible is not open to question. That the action of the state in awarding custody to non-parents who have actual custody, where the child's welfare so requires, is necessary to effectuate such a legitimate state purpose seems equally unquestionable. Petitioner's argument must, of necessity, resolve itself into a claim that it was not necessary to Mark's welfare to award him to the Bannisters in the case at bar, and thus the father's presumptive right must be enforced. This is no more than an argument of what the evidence shows. The United States Supreme Court in such a case will not weigh the evidence and base a constitutional holding on what it deems to be a preponderance. Proof of unconstitutionality must be unequivocal. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310.

Iowa is firmly committed to the "best interest" concept. Iowa Rule of Civil Procedure 344 (f) (15) states: "In child custody cases the first and governing consideration of the courts must be the best interest of the child." The Iowa Court, while giving weight to the parental preference, has for years (contrary to Petitioner's assertion on pp. 23-24) held the child's welfare to be the paramount consideration in cases where the child has been separated from his parents and they seek to regain custody.[11] The

[11] Drumb v. Keen, 47 Iowa 435 (1877); Werling v. Heggen, 208 Iowa 908, 225 N. W. 952 (1929); Jensen v. Sorenson, 211 Iowa 354, 233 N. W. 317 (1930); Ellison v. Platts, 236 Iowa 1211, 286 N. W. 413 (1939); Paulson v. Windelow, 236 Iowa 1011, 20 N. W. 2d 470 (1945); Herr v. Lazor, 238 Iowa 518, 28 N. W. 2d 11 (1947); Pelton v. Halverson, 240 Iowa 184, 35 N. W. 2d 759; Joiner v. Knieriem, 243 Iowa 470, 52 N. W. 2d 21 (1952); Durst v. Roach, 245 Iowa 342, 62 N. W. 2d 159 (1954); Finken v. Porter, 246 Iowa 1345, 72 N. W. 2d 445 (1955); McKay v. Ruffcorn, 247 Iowa 195, 73 N. W. 2d 78 (1955); Carrere v. Prunty, 133 N. W. 2d 692 (Iowa, 1965); Childers v. Childers, 136 N. W. 2d 268 (Iowa, 1965); Kouris v. Lunn, 136 N. W. 2d 502 (Iowa, 1965).

most recent child custody decision of the Supreme Court of Iowa involving a parent and non-parent is Halstead v. Halstead, 144 N. W. 2d 861. That decision speaks of the policy considerations of Iowa in child custody cases, and we respectfully refer the Court to that opinion for a concise statement of the rationale of the Iowa Court in this type of case.

The separation of a child from his parents is often tragic. But once the separation is complete and the child adjusts to this new family, it is doubly tragic to uproot him a second time. This fact has led the Iowa Court to say a number of times that where a child has lived in a home for a period of time, has formed close attachments, and is well cared for, he should not be moved therefrom except for the most cogent reasons.[12]

(c) The United States Constitution does not require that a child living with non-parents for a substantial period of time be returned upon request to the parent if he is not morally unfit or not guilty of abandonment. A court may make such an award of custody as best serves the child's welfare.

Petitioner asks this court for a Writ of Certiorari on the basis that the Constitution of the United States prohibits the award of a child to a non-parent in a custody dispute with the natural parent, absent a finding of parental unfitness or abandonment. As stated by one Michigan jurist, such a rule would carry us back

> ". . . like the Connecticut Yankee to the darker ages of English law and customs, . . . (and make) an innocent youngster an infamous idol of the discredited rule that parental 'rights' reign over the best interest of the child."[13]

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[12] Kouris v. Lunn, 136 N. W. 2d 502 (Iowa, 1965); Thein v. Squires, 250 Iowa 1194, 97 N. W. 2d 156 (1959).

[13] In Re Mathers, 371 Mich. 516, 124 N. W. 2d 878, 889.

The highest courts of at least 22 jurisdictions in this country have held that the welfare of the child is a consideration superior to rights of adult litigants.[14] In most of the cases cited in footnote 14 the courts have refused to uproot a youngster who has become established and is receiving good care in a home to return him to his natural parent, even though the parent may be a fit person and not guilty of abandonment. Questions of abandonment and moral fitness of the parent are frequently considered, but the "rights" of the natural parent have not been per-

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[14] Armstrong v. Green, 260 Ala. 39, 68 So. 2d 834 (1953); Henry v. James, 222 Ark. 89, 257 S. W. 2d 285 (1963); Root v. Allen, 151 Colo. 311, 377 P. 2d 117 (1962); Baram v. Schwartz, 151 Conn. 315, 197 A. 2d 334 (1964), Bailey v. Mars, 183 Conn. 593, 87 A. 2d 388 (1952); Hitchcock v. Thomason, Mun. Ct. of Appeals for D. C., 148 A. 2d 458 (1958); Fielding v. Highsmith, 152 Fla. 837, 13 So. 2d 208 (1943); Altimiller v. Forsman, 76 Idaho 521, 285 P. 2d 1064 (1965); Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N. E. 2d 613 (1959); Hamilton v. Sourjohn, 332 Ill. App. 279, 75 N. E. 2d 42 (1947); Scott v. Ashcroft, 342 Ill. App. 33, 95 N. E. 2d 122 (1950); Bobroff v. Levin, 350 Ill. App. 501, 133 N. E. 2d 177 (1953); Beach v. Leroy, 228 Ind. 122, 89 N. E. 2d 912 (1950); Brown v. Beachler, 224 Ind. 477, 68 N. E. 2d 915 (1946); Glass v. Bailey, 233 Ind. 266, 118 N. E. 2d 800 (1954); Paul v. Peniston, 235 La. 579, 105 S. 2d 228 (1958); Thumma v. Hartsook, 239 Md. 38, 210 A. 2d 151; Trenton v. Christ, 216 Md. 418, 140 A. 2d 660 (1958); In re Adoption of a Minor, 343 Mass. 292, 178 N. E. 2d 264; Farbes v. Warren, 184 Miss. 526, 186 So. 325 (1939); Testerman v. Frederich, 323 S. W. 2d 522 (Kan. City Ct. of Appeals, 1959); In re J....., ... Mo. ..., 357 S. W. 2d 197 (1962); Wall v. Hardee, 240 N. C. 465, 82 S. E. 2d 370 (1954); McKay v. Mitzel, 137 N. W. 2d 792 (N. D., 1965); Osburn v. Roberts, 197 Okla. 206, 169 P. 2d 293 (1946); Russell v. Russell, 208 Okla. 41, 253 P. 2d 136 (1953); Taylor v. Taylor, 182 Okla. 11, 75 P. 2d 1132 (1938); Long v. McIninch, 264 P. 2d 767 (Okla., 1953); Commonwealth v. Reed, 202 Pa. S. 558, 198 A. 2d 344 (1964); Commonwealth v. Powers, 206 Pa. S. 415, 212 A. 2d 922 (1965); Shamenek v. Allen, 179 Pa. S. 169, 116 A. 2d 336 (1955); Smith v. Smith, 188 Tenn. 430, 220 S. W. 2d 627 (1949); King v. Shrum, 244 S. W. 2d 720 (Tex. Civ. App., 1951); Trotter v. Pollan, 311 S. W. 2d 723 (Tex. Civ. App., 1958); Stout v. Massie, 140 W. Va. 731, 88 S. E. 2d 51 (1955); Morris v. Jackson, 66 Wyo. 369, 212 P. 2d 78 (1949).

mitted to outweigh the child's welfare.[15] As noted by Petitioner at pp. 27-28 of his Petition, one state[16] has adopted the model statute proposed by the Section of Family Law of the American Bar Association, reading:

> "Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody."[17]

This child-oriented rule does not seek to reward nor punish the adult litigants;[18] thus the reason that the child was placed with the non-parent in the first place is never controlling. Madden, Persons and Domestic Relations, Hornbook Series (1931), at pp. 375-376, notes:

> "Even though the parent's separation from the child was due to misfortune rather than to the parent's

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[15] In footnote 7 on P. 22 Petitioner urges that the substantial number of cases where parents become divorced, the parent awarded custody later dies, and the surviving parent seeks custody from a non-parent are distinguishable from the case at bar. They are not. The law is well settled in most jurisdictions that where the divorced parent having custody dies, the "parental rights" automatically pass to the surviving parent. And Appellee says "parental rights" are the only consideration in a parent-non-parent contest, absent unfitness of the parent or abandonment. Why, then, should a court be permitted to place the welfare of the child above "parental rights" in that class of cases but be precluded from doing so in the case at bar? In both types of cases there has been a dissolution of the family. Surely Petitioner is not arguing that in the one instance the court is punishing the living parent because he is divorced, but in the case at bar the parent should be rewarded because he is not divorced. The only reasonable rationale is that these cases are decided from the standpoint of the child's interests rather than the interests of the adult litigants.

[16] Hawaii Sess. Laws, Act 83, § 1 (2), at p. 74 (1965).

[17] ABA Section of Family Law, 1963 Proceedings, p. 38.

[18] Carrere v. Prunty, 133 N. W. 2d 692 (Iowa, 1965).

fault or voluntary act, nevertheless, the child may have formed such new associations that a restoration to its parents would so greatly damage its welfare that it will be denied."

Other legal scholars have recognized and approved the awarding of custody to a non-parent in the absence of parental unfitness or abandonment if the child's best interests demands it.[19] In 67 C. J. S., Parent and Child, § 11, pp. 635-636, it is stated:

> "A parent's right to the care, custody, and control of a minor child is merely a prima facie right, and, even though the parent is a fit and proper person, his or her right to such care, custody, and control is not an absolute right, even though there has been no voluntary abandonment of the right; and it may be invaded or entirely nullified."

And 27 Am. Jur., Infants, § 108, p. 829, states:[20]

> "Wherever a controversy arises between different claimants to the custody of a child, the probable welfare of the child is the controlling consideration to which all questions of superior legal right are entirely subordinated. This test is applied in contests not only between the father and mother of the child, but also between either or both of the parents and strangers, or where neither parent of the child is a contestant."

There are many considerations in a case of this type in addition to parental fitness and abandonment. These include the length of time the child has lived with the third

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[19] Peck, Domestic Relations (1930), pp. 371-372; Foster and Freed, "Child Custody", 39 N. Y. Univ. L. Rev. 423; Comments of Harry M. Fain, 1963 Chairman of Committee on Child Custody of the Section of Family Law appearing in ABA Section of Family Law, 1963 Proceedings; 15 A. L. R. 2d 432, 435.

[20] See also 25 Am. Jur., Habeas Corpus, § 80, p. 205.

person, the care he is receiving, the depth of his affections, ties to his present environment, the child's wishes, the child's associations with his natural parent, the effect a change of environment would have on the child's physical and mental health, the marital status and sex of the parent, the amount of time the parent could spend with the child if awarded custody, the care the parent could give the child, and the permanancy of the parent's home. If the rule Petitioner proposes were made mandatory, state courts could consider none of the above matters, but could consider only whether parental unfitness or abandonment is shown.

Courts which are so restricted have had to resort to legal fictions to circumvent the restrictions.[21] Then, too, there is the very real problem of trying to establish a satisfactory definition of "abandonment" and "unfitness." In one case, the Supreme Court of Iowa relied upon "**financial** abandonment" in awarding custody to a non-parent[22]; it seems clear that it could have likewise found Mr. Painter to have "financially abandoned" Mark had it chosen to do so. The rule for which Petitioner argues (that parental rights are absolute absent abandonment or unfitness) also results in a "tortuous wrestling"[23] with the concept of "fitness". An apt example is the case of Clifford v. Woodford, 83 Ariz. 257, 320 P. 2d 452, 454, where the Supreme Court of Arizona said:

> "If the surviving parent is shown to be unfit to assume such responsibilities **in the sense that his custody would be detrimental to the best interest and welfare of such children** then he is not entitled to their custody." (Emphasis added.)

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[21] See, for example, Laub v. Caltobelotta, 33 Misc. 2d 397; 219 N. Y. S. 2d 363.

[22] Carrere v. Prunty, 133 N. W. 2d 692, 695 (Iowa, 1965).

[23] Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, 898.

The Arizona Court then proceeded to award custody to the non-parents because it would be detrimental to the children to uproot them and place them with their parent. A note in 39 A. L. R. 2d 258, 264, states:

> "It may be observed that in such a connection the word 'unfit' is frequently treated as embracing matters touching the welfare of the child apart from or in addition to any question of moral character."

The Supreme Court of Iowa did, necessarily, find Mr. Painter "unfit" in the sense that the word is used in these authorities.

No decision of the United States Supreme Court has set constitutional standards for child custody cases, save the requirement of notice and opportunity to be heard.[24] It would be wrong to elevate Petitioner's extreme position to constitutional stature. These difficult cases are best handled locally, and the state courts must be left with sufficient discretion to fashion appropriate decrees in the widely varied factional situations coming before them.

(d) In child custody cases courts must consider the ways of life of the contestants to enter an appropriate decree. But the Iowa court in this case considered such matters only from the standpoint of what this particular child needs, and the adjustments he would be required to make if moved from one environment to the other. The fact that custody was awarded to Respondents does not mean that their way of life was found superior to Petitioner's, except as related to the particular needs of Mark.

Petitioner complains of the characterization of him by the court. The court said:

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[24] Armstrong v. Manzo, 380 U. S. 545, 85 S. Ct. 1187 (1965). In accord is Stubbs v. Hammond, 135 N. W. 2d 540 (Iowa, 1965).

"In the Painter home, Mark would have more freedom of conduct and thought with opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable."

* * * * * * *

"We believe it (life in the Painter household) would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."

The words were used to describe, not pass judgment upon. ("These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here.")

Petitioner does not complain that the words used are inaccurate. In large part they are based upon his own description of himself as shown by the record in this case. The first paragraph above refers to Petitioner as being "romantic" and "impractical". "Romantic", according to Webster's Third New International Dictionary, is a synonym of "impractical". Exhibit 24, a letter written by Mr. Painter, states:

"I think I very badly need a manager or a good business agent, since I'm apt to be heady and impractical."

The second paragraph above refers to Petitioner as "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." Webster defines "Bohemian" as "one who reflects protest against or indifference to social convention." Exhibit 23 is a letter which Mr. Painter wrote in connection with his Washington University employment:

"I'm afraid academic institutions, or for that matter, any organization large enough to go by the name of institution, do not set very well with my nature.

> For one thing, their purposes are never mine. My work here has been in defiance of the established way of doing things. . . . As for Committees v. Painter, I either say nothing and inwardly chuckle at what I think to be their folly, or say nothing and do what I want to do, or say something pointed and do nothing. I sometimes wish I had a public personality—with the guts of a Brooklyn Jew and the quick, devious logic of a Darrow—then maybe I could bend committees to my own ends. But my thought process is geared to the written word, and I am always thinking in sort of written rhetoric—a sort of meticulously designed rocket that will explode on contact when I am, at a distance, arming another. . . ."

And in Exhibit 24 he wrote:

> "I detest, with a passion, commercial portraiture; every time I pass Hutchinson's Studio, I want to throw a rock through the window. This is more canned soup."

Surely Petitioner did not consider the descriptions degrading or insulting when he wrote them; why should he assume that the court used them in that sense? In the same paragraph in which the court used the words "unconventional" and "Bohemian" to describe the Painter household it also used the words "intellectually stimulating." No fair-minded person could conclude that the Iowa court was opposed to intellectual stimulation.

In a child custody case the court must, of absolute necessity, consider the character and circumstances of the prospective custodians. It could not otherwise decree custody in the best interest of the child. Perhaps, as Respondent suggests, there are dangers in this. But the danger would be much greater if the court failed to consider the character and emotional make-up of the contestants and the child's compatibility to each.

Just because Mr. Painter was denied custody, it does not follow that the description of his character and circumstances implied rank disapproval of him. Petitioner overlooks references to him in the opinion which could not possibly be interpreted as uncomplimentary:

1) He received an honorable discharge from the Navy.

2) His marriage to Jeanne was, overall, a happy one.

3) There is no suggestion in the record that he is morally unfit.

4) In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects.

5) The Painter household would probably be intellectually stimulating.

Many would think that a label of "conventional", such as the court used to describe the Bannisters, was not complimentary (but nevertheless accurate when compared to Painter). The point is, one misses the intent of the opinion if in reading it he assumes that every word or phrase connotes an approval or disapproval of the character trait or value referred to.

The obvious purpose of showing the divergent ways of life of the Painters and the Bannisters was to demonstrate the abrupt change to which Mark would be subjected if moved. Here is a child who, after a series of very traumatic experiences, has settled into a pattern of life in which he has found happiness. He is in his latency period of development, which is the very critical stage where he is developing most of his concepts and attitudes about himself and the world (R. 415, 429, 430). He has spent

much time since living with the Bannisters in determining who he is and where he fits into his environment (R. 430). He views Mr. Bannister as his father figure and Mrs. Bannister as his mother figure, and he sees a place for himself in the Bannister family (R. 420). He is doing well in school and has many friends (R. 421). He has come a long way in developing a concept of his role in life (R. 430). Now the Painters want to take him to California, and for Mark this would mean starting all over again. Dr. Hawkes felt the chance of success was not good (R. 430).

It was with this evidence before it that the court contrasted the divergent ways of life of the Painters and the Bannisters. It was to show the substantial adjustment that Mark would have to make. If the situation were reversed (a move from the unconventional to the conventional), the same considerations would apply. The Iowa Court said:

> "It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so. **However, the philosophies are important as they relate to Mark and his particular needs.**" (Emphasis added.)
>
> * * * * * * *
>
> "These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here. They do not serve, however, to support our conclusion as to the kind of life Mark would be exposed to in the Painter household."

To deny a court the right to view the total picture before making a child custody award is to deny it the right to make an award in the best interest of the child. The Federal Constitution does not impose such restrictions.

2. The Iowa court remained neutral in the matter of religion, and any consideration given to it was merely temporal, that is from the standpoint of the adjustments which the child would have to make in changing from one religious environment to another. Adequate state grounds support the decision.

The decision makes the following references to religion of the parties:

> 1) "Mr. Bannister . . . regularly teaches a Sunday School class at the Gilbert Community Church."
>
> 2) "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'."
>
> 3) "Mrs. Painter is Roman Catholic."
>
> 4) "They (the Painters) plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule."

There can be no doubt that a court may not constitutionally prefer one religious denomination over another in the sense that it believes one denomination or another to be spiritually superior. No such problem could present itself in this case, for Mark would be raised in the congregational Church regardless of who prevailed. It has traditionally been thought that courts could, in child custody cases, recognize the value of religious training of some type for the child as opposed to no religious training.[25] But again, this question is not presented in this case as the Painters would send Mark to a church and Sunday School as have the Bannisters.

It is clear that the Supreme Court of Iowa, if it gave any weight at all to religious matters, did so only as ap-

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[25] 66 A. L. R. 2d 1410, 1413-1416.

plied to the boy's temporal welfare. The evidence would justify this in at least two respects.

First, Mark was overly-aggressive when he came to Iowa, to the point of being cruel to other children and animals. The potential for such behavior is still very much present. Apart from the theological aspects involved, the court might well have concluded that this boy needs moral training such as would be available in a church, and that his regular Sunday School and church attendance in the Bannister home is desirable.

Second, Mark has since July of 1963 attended Sunday School and church with one or both grandparents who have served as examples for him and who have been able to support his religious development because of their own beliefs. Before Mark's mother died, he had the advantage of a Congregational parent who could and did furnish him the same kind of support. If he were to go into the Painter home, however, he would be confronted with a confusing situation. He would be **sent** to a Congregational Church and would have nobody in his home to share and strengthen the beliefs of that church, Mr. Painter being agnostic and Mrs. Painter being Roman Catholic. This is an unhealthy situation for this particular child because of his need to identify and develop definite values. Dr. Hawkes so testified, without objection (R. 438). A closely-related problem is the **change** which Mark would be subjected to if moved—a change from parents who are able to support his specific religious convictions to parents who are not, and a change from regular Sunday School and church attendance to irregular attendance.

Each of the above considerations are from the standpoint of Mark's temporal welfare. Religion is incidental. They are the same types of circumstances which, for the sake of the child's mental health, would mitigate against a change from Catholic to Protestant custodians, Jewish

to Catholic, non-Christian to Christian, etc. Such considerations do not remove the state from a neutral position on religious matters so long as a particular belief is not preferred because of what is thought to be its intrinsic value.

Much of what was said in 1 (d) is applicable to complaints relating to religion.

It is clear that the court's reference to religion was incidental. The decision rests upon adequate state grounds, and thus is not reviewable by the United States Supreme Court. Durley v. Mayo, 351 U. S. 277; Dixon v. Duffy, 342 U. S. 33; Young v. Ragen, 337 U. S. 235. In the cases cited by Petitioner on p. 33, the complaining parties were penalized for their religious beliefs. No such situation exists here.

3. The decision of the Iowa court was based upon substantial evidence.

Finally, Petitioner urges that the decision below rests upon no evidence at all, and thus constitutes a denial of due process. The weight to be accorded the evidence is for the Iowa courts to determine. Dr. Hawkes is a highly competent and respected child psychologist. Three teachers and a minister also testified to the harmful effect they thought a move would have on Mark. Petitioner had a full opportunity to present evidence in this regard, but was either unable to obtain it or chose not to do so for some other reason. The Supreme Court of Iowa decided this case on the basis of the substantial evidence before it.

RESPONSE TO AMICUS CURIAE BRIEFS.

Petitions to file amicus curiae briefs on behalf of petitioner, with briefs attached, have been filed by (1) The American Civil Liberties Union and The Iowa Civil Lib-

erties Union, and (2) Board of Christian Social Concerns, New York Annual Conference of the Methodist Church; (3) The State of California has also filed a brief.

Respondents resist the respective petitions to file briefs, but make the following response in the event the petitions are granted:

(1) The brief of the American and Iowa Civil Liberties Union advances the same arguments as the principal petition, and we adopt our Brief in Opposition as our response here. We confess surprise at the brief of the American Civil Liberties Union in view of its earlier action in this case. When considering on February 28, 1966, whether to file an amicus curiae brief in the Supreme Court of Iowa in support of the Petition for Rehearing, the Board of Directors of the American Civil Liberties Union voted not to file such a brief on the ground "that the Union does not believe that there is a civil liberties issue to justify our intervention, howevermuch we dislike the language of the decision, and that we advise the Iowa Civil Liberties Union of our position."[26]

(2) In response to the brief of the Board of Christian Social Concerns, New York Annual Conference of the Methodist Church, we adopt our Brief in Opposition to Petitioner's petition.

(3) The brief of the State of California raises an issue not raised by Petitioner, to-wit, that the law of California should have been applied by the Supreme Court of Iowa. We do not feel justified in responding at length to a matter not even involved in the petition, except to note that no federal question is raised in this respect and that Petitioner did not plead or prove California law in this case

[26] Minutes of Board of Directors of the American Civil Liberties Union of February 28, 1966. Reference to these minutes is made in footnote 31 of the comment on this case in 79 Harvard L. Rev. 1710, 1715.

as required by Iowa law, In re Estate of Drumheller, 252 Iowa 1378, 110 N. W. 2d 833, nor did he ask the Supreme Court of Iowa to apply California law at the time the case was originally submitted on appeal. Further, the law of the forum where a custody issue is raised for determination, rather than the law of the domicile of the child, determines custody matters.[27]

CONCLUSION.

The writ of certiorari should be denied.

Respectfully submitted,

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[27] 15 C. J. S., Conflict of Laws, § 14 (d), p. 911; 67 C. J. S., Parent and Child, § 4, p. 630; Goodrich, Conflict of Laws, Section 136, p. 272.